Petition

81-931

Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HARRY TOUSSAINT ALEXANDER, PETITIONER

v.

DISTRICT OF COLUMBIA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Harry Toussaint Alexander
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QUESTIONS PRESENTED

Whether the evidence was sufficient to show that Petitioner willfully and intentionally disrupted and delayed the orderly process of the trial or attempted to defeat the prompt administration of justice?

Whether the trial court abused its discretion by failing to fully consider the emergency situation which precipitated Petitioner's excusable tardiness at trial?

Whether the trial court's action was predicated on facts which took place outside of the presence of the court requiring disposition upon notice and hearing?

Whether special and important reasons exist such that the Writ of Certiorari should be issued?

Whether in denying Petitioner's Motion for Reconsideration, the Appellate Court denied him due process under law?

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OPINIONS BELOW

The May 16, 1979, Order of the Superior Court of the District of Columbia finding Petitioner in contempt is located in the Appendix at page 1. The Superior Court's Order of June 13, 1979, denying reconsideration is located at pages 3 through 9 of the Appendix. The Order of the District of Columbia Court of Appeals dismissing Petitioner's appeal is found at page 10 of the Appendix. The Memorandum and Order of the District of Columbia Court of Appeals denying Petitioner's Motion for Reconsideration appears at 431 A. 2d (D.C. App. 1981), Appendix 2, page 11 of the Appendix. The District of Columbia Court of Appeals' Order

denying Petitioner's Petition for Rehearing en banc is page 19 of the Appendix.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court rests in 28 U.S.C. § 1257. On June 13, 1979, the Superior Court of the District of Columbia denied Petitioner's Motion for Reconsideration. On June 4, 1980, the District of Columbia Court of Appeals dismissed Petitioner's Appeal. On May 27, 1981, the District of Columbia Court of Appeals denied Petitioner's Motion for Reconsideration. On July 20, 1981, the District of Columbia Court of Appeals denied Petitioner's Petition for Rehearing en banc. This petition is filed within ninety days of that date.

STATUTES AND RULES INVOLVED

Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War on public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rules of the Supreme Court

Rule 19(1)(a)

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Superior Court Rules

Civil Rule 104(b)(3)

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STATEMENT OF THE CASE

On May 16, 1979, Petitioner was summarily judged in contempt of court and ordered to pay a fine of one hundred and fifty dollars ($150.00) or serve a sentence of five days in jail. The evidence upon which the Court's judgment rested is as follows:

On May 11, 1979, Petitioner was to appear in Courtroom 14 at 9:00 a.m. to continue the case of District of Columbia v. Reed (Cr. No. T-14902-78). Since Petitioner was feeling quite ill and had begun to run behind on his schedule, he instructed a clerk at his office to notify the Court that he

would be a few minutes tardy. Petitioner's clerk complied, but was unable to reach anyone in the trial court's chambers until 8:58 a.m. (Tr., p-3). By coincidence, the trial judge had taken the bench at 8:58 a.m. The trial judge accepted Petitioner's explanation and dismissed the matter of tardiness without significant comment. (Tr., p-3).

On May 14, Petitioner, through no fault of his own, was required to appear before another court during the luncheon recess in the Reed case. He was unable to leave the second court in question until 2:08 p.m., or six minutes after the trial judge in Reed was ready to proceed. Again, the trial judge accepted Petitioner's explanation without

comment, thereby implying that Petitioner's explanation was satisfactory beyond reservation.

On May 16, Petitioner was scheduled to appear before the trial judge in Reed in order to resume trial. However, shortly before leaving for court, he was contacted by a client who was in danger of suffering immediate eviction unless certain papers were immediately filed in Landlord and Tenant Court. Petitioner was in no way responsible for the client's predicament. Nevertheless, he decided to come to the aid of the client in the matter, as a conscientious attorney would have done.

He was also mindful of his duty to appear in Courtroom 14 by 9:15 a.m. Faced with this situation, Petitioner again instructed his office to notify the court that he would be delayed a few minutes due to an emergency with respect to a client.

A clerk began telephoning the trial judge's chambers at 8:45 a.m., but was unable to reach anyone there until 9:27 a.m. (Tr. II, p. 3). Petitioner stopped by Courtroom 14 at 9:00 a. m. to personally apprise the court of the dilemma but no one had arrived. He, therefore, proceeded to Landlord and Tenant Court with the expectation that said matter would be completed in sufficient time to allow Petitioner to be in court on a timely basis.

At 9:28 a.m., the trial judge sent a clerk to Landlord and Tenant Court to summon Petitioner to chambers. At 9:58 a.m., Petitioner was in chambers, and shortly thereafter was advised that he was in contempt of court. Petitioner gave an explanation and thereafter tried unsuccessfully on several occasions to elaborate, but the trial court refused to hear him (Tr. II, p.-5). Therefore, the Court denied a Motion for Reconsideration which further elucidated the matter.

STATE OF PROCEEDINGS IN WHICH FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

Petitioner raised the instant Federal question for which he seeks review in his Motion to Reconsider and Vacate Contempt

Citation before the Superior Court of the District of Columbia and then again in his Motion for Summary Reversal before the District of Columbia Court of Appeals.

ARGUMENTS IN FAVOR OF GRANTING WRIT

I. THE EVIDENCE IS INSUFFICIENT TO SHOW THAT PETITIONER WILLFULLY AND INTENTIONALLY DISRUPTED AND DELAYED THE ORDERLY PROCESS OF THE TRIAL, NOR DID PETITIONER ATTEMPT TO DEFEAT THE PROMPT ADMINISTRATION OF JUSTICE

The judiciary's inherent power to punish affronts to its authority as criminal contempt rests on the premise that courts must have the ability to vindicate their authority by ensuring obedience to their orders and respect for their processes. Ex parte Terry, 128 U.S. 289 (1888).

Nevertheless, the Supreme Court has recognized that "criminal contempt is a crime in every fundamental respect." Bloom v. Illinois, 391 U.S. 194 (1968). Hence a contemnor is entitled as a matter of due process, to most of the procedural protections available to defendants in ordinary criminal prosecutions. In re Oliver, 333 U.S. 257 (1948); Taylor v. Hayes, 418 U.S. 488 (1974).

For example, each element of a criminal contempt, including the requisite mental state, must be proved beyond a reasonable doubt. In re Brown, 455 F. 2d 999 (D.C. Cir. 1971); In the Matter of Brown, 320 A.2d 92 (D.C. App. 1974). The element of mens rea is not eliminated or reduced merely because summary procedures are invoked. In re

Williams, 509 F. 2d 949 (2nd Cir. 1975); United States v. Seale, 461 F.2d 366 (7th Cir. 1972).

The primary limitation on a court's power to punish attorneys for contempt is the well-established principle that a contemnor must have "willfully disregarded" the authority of the court. Sykes v. United States, 144 U.S. App. D.C., 531, 44 F. 2d 928 (1971); See also, In re Farguhan, 160 U.S. App. 295, 492 F. 2d 561 (1973).

Before the absence of an individual, particularly an officer of the court, can be adjudged willfully disrespectful or contumacious, there must first be a finding of fact as to the reasons therefore. Matter of Yengo, 167 N.J. Supp. 66, 400 A.2d 517 (N.J.

A.D. 1979). As stated by the court In re Allis, 531 F. 2d 1391, 1392 (9th Cir. 1976):

> Absence (tardiness) alone is not contempt. The reasons for the default are important. A contempt is a wilful disrespect or disobedience of public authority and the requisite wrongful intent may be inferred from the attorney's reckless disregard of his obligations to the Court. /citation omitted/ If an explanation for tardiness is made which is inconsistent with willful disobedience, a hearing must be held, if the facts are disputed, or, if the explanation is not accepted, there is no contempt.

In the instant case, the trial court accepted Petitioner's explanation for his brief absence on two occasions, yet cited those two occasions as evidence of contumacious conduct (Order dated May 16). Moreover, the manner in which the trial court

conducted the examination regarding Petitioner's absence on the third occasion violated due process of law and its findings were inconsistent with the evidence.

People v. Edwards, 69 Ill. App. 3d 629, 387 N.E. 2d 969 (1979) best illustrates Petitioner's contentions. There, defense counsel and prosecutors were advised to be in court at 11:00 a.m. However, appellant did not arrive until 11:50 a.m. He informed the court that he had been delayed in another proceeding, and that he had advised his secretary to notify the court that he would be late. No one in the court, however, acknowledged having received such a call. Appellant was then held in contempt of court. In reversing appellant's conviction for contempt, the appellate court held

that the fact-finding hearing violated due process, and the trial court had failed to prove that appellant's secretary had not, in fact, called or "failed to follow his instruction," i.e., the evidence failed to establish that Appellant "possessed the requisite intent to place the court in disrepute or to obstruct the administration of justice." Id. at 971; accord, Matter of Brown, 320 A. 2d 92 (D.C. App. 1971). See In re Nesbitt, 313 A. 2d 576 (D.C. App. 1973); Sykes v. United States, supra.

If an officer of the court is unable to appear through no fault of his own, his action cannot be considered wilful. Kellar v. 8th Jud. Dist. Ct., 470 P. 2d 434 (Nev.

1970). Roselle v. State, 509 P. 2d 486 (Ok. 1973) typifies cogent reasons. There, defense counsel was held in contempt for arriving at court fifteen minutes late. Counsel was unfamiliar with the town where the court was located and had gotten lost. In reversing appellant's conviction, the court held, significantly, 509 P. 2d at 488:

> In conclusion, we note an act of God is not the exclusive defense to a trial court's allegations of contempt. The record in this case at bar manifests a requirement of attorneys always to be present when a case is scheduled, without allowing any flexibility. We find this requirement to be unrealistic. (Italics supplied).

A similar situation prevailed in the instant case. On each of the three occasions where Petitioner believed he would be late

for the resumption of trial, he attempted, both personally and via his office, to notify the trial court before hand. On one occasion, he was late due to illness; on a second occasion, he was before another court and could not simply "walk out." In re Fraguhan, supra. On the third occasion, he was faced with the choice of permitting a client and family to be possibly evicted or notifying the court that he would be a few minutes late and proceeding to help the client in Landlord-Tenant Court. For this, the trial court ruled that Petitioner had wilfully "disrupted and delayed the orderly process of the trial, defeating the prompt administration of justice." (Order, May 16). Ironically, the process of the trial was

delayed more than an hour after Petitioner was held in contempt. One of the jurors delayed the trial because automobile trouble precluded timely arrival.

The facts upon which the court based contempt of court were wholly insufficient to establish beyond a reasonable doubt that Petitioner "possessed the requisite intent to place the court in disrepute or to obstruct the administration of justice." Edwards, supra. Moreover, Petitioner's absence did not cause the delay; the total delay was caused by the juror's excusable conduct. Counsel's tardiness should have been excused under the circumstances, since it stemmed solely from his good faith efforts

to advise the trial court in accordance with accepted and established practices and his concomitant endeavors to protect another client's fundamental rights in an emergency matter. Even if counsel had not sought to handle an emergency matter, trial could not have resumed without the juror.

Accordingly, Petitioner respectfully suggests that the evidence is insufficient to show that Petitioner wilfully and intentionally disrupted or delayed the orderly process of the trial, nor did Petitioner attempt to defeat the prompt administration of justice.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FULLY CONSIDER THE EMERGENCY WHICH PRECIPITATED PETITIONER'S EXCUSABLE TARDINESS AT TRIAL.

Rule 104 of the Civil Rules of the Superior Court of the District of Columbia sets forth procedures and priorities for the avoidance and resolution of conflicts in engagements of counsel among the courts in the District of Columbia. The orders issued by the Honorable Gladys Kessler, of the Superior Court, are expressly based on Rule 104(b)(3) which provides that "Nontrial matters in a trial court will yield to trials in any court."

However, Rule 104 provides further guidelines for ascertaining the priority to be accorded to non-trial matters vis-a-vis scheduled trials. Specifically, Rule 104(b)(4) requires consideration of the urgency and

complexity of non-trial matters, as well as the difficulty of rescheduling the non-trial matter. Further, said rule explicitly provides that the court "will be receptive to to counsel's application for a change of the trial date or an adjustment of the hours of trial. . . ."

Further, Rule 104(b)(5) provides that, "The judges of this court, insofar as practical, will attempt to adjust their schedules to enable an attorney to attend to brief non-trial matters. . . ." That rule states that "It is recognized that emergency situations will arise and that certain types of cases may require special consideration. The judges of this court will attempt to

accommodate these situations by recognizing the need to depart on occasion, from rigid scheduling rules. . . ."

In this matter, it was the undisputed assertion of the Petitioner that just such an emergency situation had arisen. Nevertheless, the trial court chose to totally ignore the dilemma faced by the Petitioner, purporting to base its contempt citation entirely on the tardiness of the Petitioner and on the non-trial nature of the conflicting matter.

For this reason, the Petitioner respectfully submits that the trial court abused its discretion in that said court failed to consider all factors required pursuant to its own Civil Rules.

III. THE TRIAL COURT'S ACTION WAS PREDICATED ON FACTS WHICH TOOK PLACE OUTSIDE OF THE PRESENCE OF THE COURT REQUIRING DISPOSITION UPON NOTICE AND HEARING.

The Rule governing criminal contempt, Rule 42 of the Criminal Rules of the Superior Court of the District of Columbia, contemplates two separate and distinct circumstances under which criminal contempt may be adjudicated.

Rule 42(a), pursuant to which the court ostensibly acted, provides that the matter may be disposed of summarily if the "judge certifies that he saw or heard the conduct consituting the contempt and that it was committed in the actual presence of the court."

Rule 42(b) provides that in all other situations, criminal contempt must be disposed of upon notice and hearing, allowing a reasonable time for the preparation of the defense.

While the trial court purported to act solely on the basis of the nonappearance of counsel, the Order dated May 16, 1979, and the Memorandum Order dated June 13, 1979, clearly indicate that the court acted on the basis of additional factors which occurred outside the presence of said Court.

Specifically, the court determined that Petitioner "wilfully and intentionally chose to take care of a non-trial matter in the Landlord and Tenant Branch of this Court,

without obtaining permission of this trial court;" that Petitioner "appeared in this Court's chambers at 9:45 a.m. only after being summoned to Chambers by the Court's law clerk;" and that Petitioner's conduct "was not justifiable on the grounds of properly representing his client" (Order, May 16, 1979).

Further, the trial court based its action on the fact that it considered the matter "a relatively simple 'driving under the influence case'"; on its attempt to expedite the trial; on its perception of how long such a case should take; on the back-log of traffic cases; on its mistaken belief that Petitioner failed to leave any message

as to his whereabouts; on the fact that Petitioner's law clerk telephoned the courtroom clerk to inform the court of Petitioner's whereabouts, and the reason for delay and finally, on the fact that Petitioner "was located, not before a judge in Landlord and Tenant Court, but in a clerical office of the Landlord and Tenant Branch." (Memorandum Order, June 13, 1979).

Therefore, it is clear that the Court did not seek to punish Petitioner for tardiness, but sought to punish him because the Court believed that Petitioner had not sought permission; that the non-trial matter was not of sufficient importance; that the Court was backlogged; that the matter was

taking too long and that Petitioner was in a clerical office rather than before a judge.

Ironically, the Court chose to ignore the uncontradicted assertions of the Petitioner. Had the Court done so, it would have been required to find that an emergency situation existed, that Petitioner had personally appeared in court at least fifteen (15) minutes prior to the appointed time and that Petitioner had also attempted to inform the Court through his office personnel.

Because the due process requirements of notice and hearing need not be observed in punishing contempt summarily, application

of the rule permitting summary punishment of contempt must be narrowly limited. United States v. Abascal, 509 F. 2d 752 (9th Cir., 1975). Therefore, in order to invoke subdivision (a) of the rule, contempt must not only be committed directly under the eye or within the view of the court, but must be an open threat to the orderly procedure of the court and a flagrant defiance of the person and presence of the judge before the public. United States v. Marra, 482 F.2d 1196 (2nd Cir., 1973). Significantly, this requirement is one not only of the rule but of due process. United States v. Meyer, 462 F. 2d 827, 149 U.S. App. D.C. 212 (1972).

For these reasons, the Petitioner respectfully submits that the trial court erred in summarily finding Petitioner in contempt while considering circumstances which were not witnessed by said Court thereby depriving Petitioner of due process of law guaranteed by the Fifth Amendment.

IV. SPECIAL AND IMPORTANT REASONS EXIST FOR GRANT OF THE WRIT OF CERTIORARI

Rule 19 of the Rules of the Supreme Court indicates the considerations governing review on certiorari. These considerations include the situation where a state court has decided a federal question not theretofore determined by the Supreme Court or that is not in accord with applicable decisions of the Court. Rule 19(1)(a).

In this matter, the Superior Court of the District of Columbia has ruled that it has the power to summarily dispose of criminal contempt matters in which consideration is given to selected factors occurring outside the presence of the Court. While Petitioner is not aware of any Supreme Court cases on point, Petitioner respectfully suggests that the issue of due process as guaranteed under the Fifth Amendment places the procedure utilized in the category of constitutional violations of the highest order. In essence, the trial court has paid lip service to the requirements of due process and its own rules while at the same time ignoring both. When a

criminal conviction of an officer of the court is at stake, review by this Honorable Court is clearly warranted.

Moreover, the facts indicate that the trial court decided an important state question in such a way as to conflict with its own rules. Rule 19(1)(b).

Wherefore, the premises considered, the Petitioner respectfully asserts that the trial court has decided the federal question of due process and the state question of the applicability of its own rules in a manner that has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

V. IN DENYING PETITIONER's MOTION FOR RECONSIDERATION THE APPELLATE COURT DENIED HIM DUE PROCESS UNDER LAW.

On June 20, 1980, the District of Columbia Court of Appeals denied Petitioner's Motion for Reconsideration, finding that the Court was without jurisdiction to consider the appeal. However, in her separate statement, The Honorable Julia Cooper Mack noted that Petitioner was certainly faced with an ambiguity as to what was a final order of the trial court for purposes of appeal. In the Matter of Harry Toussaint Alexander, 431 A. 2d (D.C. App. 1981) Appendix No. 2.

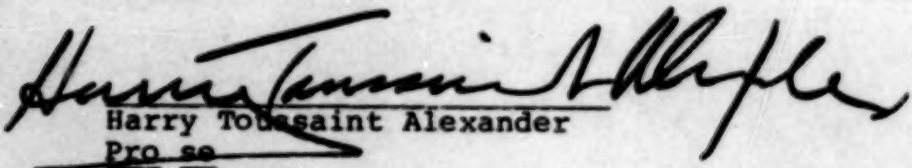
As pointed out by Judge Mack, the record does not clarify the matter. For the

Appellate Court to penalize Petitioner who has been summarily found in criminal contempt, by precluding jurisdiction, is a denial of due process as guaranteed by the Fifth Amendment. While Petitioner is not aware of any Supreme Court cases directly on point, the issue of due process And the Appellate Court's denial of its protections here places the finding of no jurisdiction in the category of constitutional violations of the highest order.

CONCLUSION

In view of the foregoing, and the record *in toto*, it is respectfully submitted that Petitioner's Petition for Writ of Certiorari be granted.

Respectfully submitted,



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APPENDIX

APPENDIX A

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

CRIMINAL DIVISION

MISDEMEANOR TRAFFIC BRANCH

DISTRICT OF COLUMBIA	:	
Plaintiff,	:	
v.	:	Docket No. T-14902-78
ALPHONSO REED,	:	
Defendant.	:	

O R D E R

This Court finds that Harry Toussaint Alexander, Esquire, on May 16, 1978 in the course of representing the above-named Defendant at trial, willfully and intentionally failed to appear at 9:15 a.m., the

starting time for continuation of the trial in the above-cited matter, with full knowledge of S.C.R. Civil Rule 104 establishing that trial obligations take precedence over all other matters. The Court further finds that Mr. Alexander instead of appearing in Courtroom 14 for the continuation of trial in the present case, willfully and intentionally chose to take care of a non-trial matter in the Landlord and Tenant Branch of this Court, without obtaining the permission of this trial Court. The Court further finds that Mr. Alexander appeared in this Court's Chambers at 9:45 a.m. only after being summoned to Chambers by the Court's law clerk. Finally, the Court finds that there have been

earlier instances in the course of this trial in which Mr. Alexander has been late to court despite a definite starting time having been set for trial proceedings.

It appears to the Court that the above conduct of Mr. Alexander was per se contemptuous in that it:

(1) disrupted and delayed the orderly process of the trial, defeating the prompt administration of justice;

(2) was not justifiable on the grounds of properly representing his client;

(3) was inconsiderate and disrespectful to the Court, the jurors, the Defendant, and the Government counsel, all of whom are participants in the present trial.

WHEREFORE, it is hereby this 16th day of May, 1979,

ORDERED: That Harry Toussaint Alexander, Esquire be held in contempt of this Court; and, it is

FURTHER ORDERED: That he pay a fine of $150.00 or serve five (5) days in jail.

Gladys Kessler
GLADYS KESSLER, JUDGE

Dated: May 16, 1979

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APPENDIX B

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

CRIMINAL DIVISION

MISDEMEANOR TRAFFIC BRANCH

DISTRICT OF COLUMBIA,	:	
Plaintiff,	:	
v.	:	Docket No. T-14902-78
ALPHONSO REED,	:	
Defendant.	:	

MEMORANDUM ORDER

This matter was certified to the Court on May 9, 1979, for a trial by jury on a charge of Driving Under the Influence, in violation of D.C. Code § 40-605. On May 16, 1979, as a result of defense counsel Harry

Toussaint Alexander's failure to appear in Courtroom 14 at the designated time for trial, 9:15 a.m., this Court issued a contempt citation and imposed a penalty of $150 or five days in jail. On May 29, 1979, Mr. Alexander filed a Motion to Reconsider and Vacate Contempt Citation. For the following reasons, the Motion is denied.

Findings of Fact

At 9:40 a.m. on May 9, 1979 the present case was certified for trial to this Judge.

The jacket contained a defense Motion to Dismiss for Lack of Speedy Trial which had not yet been heard or decided. Testimony and argument were heard, and the Motion was denied. Because of the length of the

Motion hearing, and consideration of other preliminary matters, the case was continued for trial until the next day at 9:15 a.m.

During the course of the Motion proceeding on May 9, 1979, Mr. Alexander represented to the Court that a person from out of town was waiting for him in his office, and requested a lunch recess that was far earlier and longer than the Court would have ordinarily granted. However, defense counsel's request was granted. Despite the Court's effort to accommodate Mr. Alexander's personal schedule, Mr. Alexander returned to the courtroom at least fifteen minutes late and offered no reasons for his tardiness.

Trial commenced May 10, 1979, continued to May 11, 1979, May 14, 1979, and May 15,

1979. On each day the Court set the starting time for 9:15 a.m. Mr. Alexander was late in returning to the courtroom on numerous occasions, ranging from fifteen to five minutes. It was the Court's observation that Mr. Alexander was rarely--if ever--on time after overnight and luncheon recesses.

By the morning of May 16, 1979, after hearing four long days of testimony (starting at 9:15 a.m. and concluding between 4:45 and 5:15 p.m.) on a relatively simple "driving under the influence case" which turned on the credibility of two key witnesses, the Court had determined to call counsel from the courtroom at 9:15 a.m. to meet in

Chambers to discuss proceeding more expeditiously with the trial.[1/]

1/ The Court was seriously concerned about the disproportionate period of time being spent in the trial of this case. Having tried numerous such cases in the six weeks since being assigned to Traffic Trials, and having conducted trials producing both acquittals and guilty verdicts, and having observed all manner of both defense and government counsel, the Court was well aware that such cases should ordinarily take 1-2 days to try. This was particularly true where the government offered no breathyilizer results, as in the present case.

Because of these concerns, the Court ultimately imposed rather strict procedural rules on counsel for both sides--to which no objection was made--and testimony was in fact completed by 5:00 p.m. on May 16, 1979.

In addition, the Court was well aware that she was the only judge handling Traffic trials, and that as of May 1, 1979, there was a backlog of 776 cases awaiting trial.

Mr. Alexander failed to appear in Courtroom 14 at 9:15 a.m., or to leave any message as to his whereabouts. At 9:27 a.m., his law clerk telephoned the courtroom clerk to inform her that Mr. Alexander was in Landlord and Tenant Court, taking care of another matter, and would be late for trial. No message was left as to when, if ever, he might appear.

At 9:35 a.m., this Court sent her law clerk to find Mr. Alexander, and to ask him to report to Chambers immediately.

1/ Footnote continued
Of these 776 cases, 327 were calendared for trial, and 449 were on the status calendar.

Mr. Alexander was located, not before a judge in Landlord and Tenant Court, but in a clerical office of the Landlord and Tenant Branch. After being directed to appear in this Court's Chambers, he reported at 9:45 a.m. After setting forth its position on defense counsel's contumacious conduct, and asking defense counsel certain questions to elicit his whereabouts, and whether he had been in trial before another judge, this Court made a summary finding that Mr. Alexander was in direct contempt of court. Shortly thereafter, a written Order was issued and the penalty of $150 or five days in jail was imposed.

Conclusions of Law

Direct criminal contempt occurs when a person willfully and intentionally engages

in contumacious conduct in the presence of the court. D.C. Code §11-944; S.C.R. Crim. R. 42(a); In Re Hunt, 367 A.2d 155 (D.C. App. 1976).

Pursuant to S.C.R. Civil R. 104(b)(3), providing that trials take precedence over all other matters, all counsel have a clear duty to appear at the court-appointed time in an ongoing trial. Failure to appear timely is deemed to be contumacious conduct occurring in the presence of the court. Sykes v. U.S., 264 A.2d 894 (D.C. App. 1971); In Re Nesbitt, 313 A.2d 576 (D.C. App. 1973); In Re Sol Rosen, 315 A.2d 151 (D.C. App. 1974); In Re Hunt, supra.

In the instant case, counsel was directed to sppear at 9:15 a.m. (the same

starting time set for the four earlier trial days), but failed to do so. He subsequently appeared at 9:45 a.m. Since Mr. Alexander only appeared after being summoned, it is not clear at what time he would have ever chosen to appear in court.[2/] On virtually identical facts, the District of Columbia Court of Appeals has upheld contempt citations where counsel appeared seven minutes late in one instance,[3/] and thirty minutes late in another.[4/]

2/ Counsel contends that in addition to a finding of lateness on the date in question, this Court must also establish a pattern of delay. While the Court finds this argument unmeritorious and contrary to case law, In Re Hunt, supra, at 156 and In Re Sol Rosen, supra at 152, it has already been noted that counsel was in fact repeatedly late, delaying proceedings for up to fifteen minutes.

3/ In Re Hunt, supra at 156.

4/ In Re Sol Rosen, supra at 152.

Defense counsel's own Motion and affidavits support rather an contradict this Court's finding of unjustified lateness. They show clearly that without permission or explanation, counsel "deliberately and willfully substituted his own judgment for a direct order of the Court." In Re Hunt, supra at 157.

Mr. Alexander admits to his unexplained lateness, but argues that the requisite mens rea was not present to sustain a finding of criminal contempt, inasmuch as "counsel did not willfully or intentionally fail to communicate with this Court." Intent to communicate with the Court, however, is not the intent required to establish a direct contempt of this nature. Rather, the issue is whether counsel intentionally and wilfully

chose to appear elsewhere on behalf of another client, and thereby "substituted his own judgment" for the judgment of this Court.[5/] This is the intent required to support a finding of direct contempt of Court, and this is the intent which is amply supported by defense counsel's own sworn papers

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5/ Mr. Alexander, who is an experienced trial lawyer, as well as a former Judge of this Court, was fully familiar with S.C.R. Civil R. 104(b)(3), giving priority to trial matters. The procedure which should have been followed, was an advance request to appear late so as to handle the Landlord and Tenant matter. It should also be noted that Mr. Alexander was not even found transacting business in another courtroom before another Judge. Rather, he was merely taking care of clerical matters in the Landlord and Tenant Finance Office. Perhaps that accounted for his reluctance to request a further delay in a Driving Under the Influence trial entering its fifth day.

and by the facts of the case.[6/]

Where, as here, the Court finds a person in direct criminal contempt, summary punishment is the appropriate remedy. S.C.R. Crim. R. 42(a). As the record reflects and as required by law, the contempt citation was preceded by oral findings of fact, and was followed by the issuance of an unambiguous written Order, which informed defense counsel what conduct constituted the contempt, and the

6/ In In Re Hunt, supra, the Court of Appeals upheld a finding of contempt when a lawyer chose to resolve two other non-trial matters in other courtrooms. Although the lawyer had not intention of being late the Court held that by "/d/etermining his own order of priorities" instead of complying with the trial judge's order to appear, the lawyer had demonstrated the requisite criminal intent.

penalty which flowed from the contemptuous act. S.C.R. Crim. R. 42(a); In Re Hunt, supra, at 157.

This Court strongly believes that the contempt power should be used sparingly and only when counsel's conduct is clearly contumacious. Nor should it be used for unintentional or minor infractions of Court rules. Defense counsel seeks to justify his conduct on the ground that it was a "mere technicality."[7/] Willful and intentional failure to

7/ Mr. Alexander also argues that since the Court was forced to delay resumption of the trial until 11:15 a.m. because of the absence of a juror, his non-appearance should be excused.

The fortuitious lateness of a juror -- who called in several times that

appear at the pre-established time for resumption of trial, causing inconvenience and delay to the jurors, the defendant, opposing counsel, and the Court, is never a "mere technicality." On the contrary, Mr. Alexander's conduct exemplifies "the recurring problems faced by the Judges of the Superior Court in their efforts to maintain an orderly system of justice and to keep abreast of their calendars," In Re Sol Rosen, supra at 153.

7/ Footnote continued
morning to advise the Court that his car had broken down and that he was on his way -- can hardly serve to excuse Mr. Alexander's conduct. As a practical matter, because of Mr. Alexander's lateness, as well as the juror's assurances of arrival, the Court chose to wait for approximately one hour until he did in fact arrive. Had counsel been in court on time, the Chambers conference would have been concluded by 9:30 a.m., and the Court would have designated alternate juror #1 to replace the missing juror.

WHEREFORE, it is hereby this 13th day of june, 1979,

ORDERED: That defense counsel Harry Toussaint Alexander's Motion to Reconsider and Vacate Contempt Citation be, and is, hereby denied.

Gladys Kessler
GLADYS KESSLER, JUDGE

Dated: June 13, 1979

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APPENDIX C

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 79-699 Filed June 4, 1980

IN THE MATTER OF:

HARRY TOUSSAINT ALEXANDER, T 14902-78

Appellant.

BEFORE: Kern and Ferren, Associate Judges.

O R D E R

On consideration of appellant's motion for summary reversal, appellee's opposition filed with respect thereto, appellee's motion for summary affirmance, and the record on appeal, it is

ORDERED that this appeal is hereby dismissed for lack of jurisdiction /see D.C. App. R. 4-II(b)/.

PER CURIAM

Copies to:

Honorable Gladys Kessler

Clerk, Superior Court

Harry Toussaint Alexander, Esquire
815 15th Street, NW. #1102, 20005

Richard W. Barton, Esquire
Deputy Corporation Counsel

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 79-699

IN THE MATTER OF:

HARRY TOUSSAINT ALEXANDER, APPELLANT.

On Motion for Reconsideration

(Hon. Gladys Kessler, Trial Judge)

(Submitted June 20, 1980 Decided May 27, 1981)

Harry Toussaint Alexander, pro se.

Judith W. Rogers, Corporation Counsel, with whom *Richard W. Barton*, Deputy Corporation Counsel at the time the Motion was filed, and *Leo N. Gorman*, Assistant Corporation Counsel, were on the Motion for Summary Affirmance, for appellee.

Before KERN, MACK, and FERREN, *Associate Judges*.

Opinion for the court by *Associate Judge* FERREN.

Separate Statement of *Associate Judge* MACK at p. 8.

FERREN, *Associate Judge*: On June 4, 1980, this court dismissed appellant's appeal of an order of criminal contempt for lack of jurisdiction due to the late filing of the notice of appeal. On motion for reconsideration, we con-

clude once again that we are without jurisdiction to consider the appeal.

I.

On May 16, 1979, the trial court held appellant in contempt of court for failure to appear on time for trial. Appellant, an attorney, was representing a defendant on a misdemeanor charge of driving while intoxicated. On the same day, the judge entered an order pursuant to Super. Ct. Cr. R. 42(a), setting forth the facts surrounding the contempt and imposing a sentence of a fine of $150 or five days in jail. On May 29, 1979, appellant filed a "Motion to Reconsider and Vacate Contempt Citation." On June 13, 1979, the judge denied the motion in a Memorandum Order. On June 20, 1979, appellant filed a notice of appeal from the contempt order of May 16. *See* D.C. Code 1973, § 11-721(a)(1); D.C.App. R. 4 II(b).

On June 4, 1980, this court dismissed the appeal for lack of jurisdiction on the ground that the appeal was not timely filed. On June 19, 1980, appellant moved to reconsider that dismissal. *See* D.C.App. R. 40(a). We now grant appellant's motion for leave to file the motion for reconsideration, time having expired, but deny the motion for reconsideration on the merits.

II.

Appellant contends that his filing of a motion for reconsideration in the trial court tolled the period for filing the notice of appeal, and that because he filed his notice of appeal within ten days of the trial court's disposition of his motion, his notice of appeal was timely. We perceive no way in which appellant's motion to reconsider can be said to have tolled the appeal period.

The trial court's order holding appellant in criminal contempt and imposing sentence was a final, appealable order. *In re Cys*, D.C.App., 362 A.2d 726, 728-29 (1976); *West v. United States*, D.C.App., 346 A.2d 504, 505 (1975); D.C. Code 1973, § 11-721(a)(1). Appellant noted his appeal from that order.

The rules of this court provide that, in general, a party must file a notice of appeal in a criminal case "within ten days after entry of the judgment or order from which the appeal is taken." D.C.App. R. 4 II(b)(1). The Clerk of the Superior Court entered the judgment of contempt in the criminal docket on May 16, 1979; accordingly, the ten days for filing a notice of appeal began to run from that date. *See* D.C.App. R. 4 II(b)(4).[1]

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[1] Appellant is not entitled to the additional three days provided in D.C.App. R. 4 II(b)(4) for filing a notice of appeal when a judgment or final order is entered out of the presence of the parties and counsel. An additional three days is extended only if the order is entered "without previous notice to [the parties] of the court's decision . . . ." *Id.* Here, by contrast, the trial judge stated in her Memorandum Order on appellant's motion for reconsideration that she made "a summary finding that Mr. Alexander was in direct contempt of court" in his presence.

Nor does this case fall within the exception to D.C.App. R. 4 II(b)(4) postponing the effective date of the entry of a judgment or order "where the trial judge clearly expresses an intention that a written order condition the time for filing an appeal." *United States v. Nicks*, D.C.App., —— A.2d —— (Nos. 79-655 & 79-697, March 3, 1981, slip op. at 5). The trial court followed its oral finding of contempt later the same day with a written order holding appellant in contempt and imposing sentence. The record contains no indication that the trial court considered the May 16 docket entry of the contempt order or its own written order of the same date to be anything but final.

The rules also state that certain postjudgment motions —specifically, "a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence"—toll the appeal period. D.C.App. R. 4 II(b)(2). Appellant's motion to reconsider does not come within the express scope of this rule.

First, appellant's motion cannot be construed as a motion for arrest of judgment. *See* Super. Ct. Cr. R. 34. The court must arrest judgment only "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." *Id.* Appellant made neither contention in his motion for reconsideration.

Second, appellant's motion arguably could be considered a motion for a new trial. Because summary disposition of a criminal contempt is prosecuted not upon notice of hearing but simply by order of the judge observing contemptuous conduct, *see* Super. Ct. Cr. R. 42(a), a motion for consideration would amount, in effect, to a request for a "new trial." *See* Super. Ct. Cr. R. 33. Nonetheless, even if we consider appellant's motion for reconsideration as a motion for new trial, it was not timely filed. A motion for new trial must be filed "within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." *Id.* Appellant filed his motion on May 29, 13 days after the trial court's order of contempt. Because the motion was not filed within seven days, even as a new trial motion it cannot toll the time for filing a notice of appeal. *Cf. United States v. Stolarz*, 547 F.2d 108, 110 (9th Cir. 1976) (untimely motion for new trial under FED. R. CRIM. P. 33 does not extend time to file notice of appeal), *aff'd after remand*, 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977).

Finally, appellant contends that the filing of a motion for reconsideration tolls the period for filing a notice of appeal, even though our rules do not specifically so provide.[2] Even if we assume, contrary to the suggestion in *United States v. Jones*, D.C.App., 423 A.2d 193, 196 n.4 (1980), that a motion for reconsideration can toll

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[2] This court has rejected such a contention in the context of appeals in civil cases. In *901 Corp. v. A. Sandler Co.*, D.C.App., 254 A.2d 411 (1969), this court held that in the absence of specific authority, a motion for reconsideration does not toll the time for filing an appeal. *See id.* at 412.

The rules of this court governing civil appeals since have been amended and now provide:

> The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing pursuant to the rules of the Superior Court of the following motions . . .:
>
> • • •
>
> a motion to vacate, alter or amend the order or judgment;
>
> • • • and
>
> any motion seeking relief in the nature of the foregoing. [D.C.App. R. 4 II(a)(2).]

In *Coleman v. Lee Washington Hauling Co.*, D.C.App., 388 A.2d 44 (1978), we held that under the new rule "a motion to reconsider a judgment or other appealable order, filed within ten days of entry of such judgment or order, terminates the running of the time for noting an appeal . . . until the motion is acted upon." *Id.* at 47.

Because appellant filed the motion to reconsider this case after the ten-day appeal period had expired, we need not decide whether a motion to reconsider filed within the appeal period would toll the appeal period in a criminal case. *Accord, United States v. Jones*, D.C.App., 423 A.2d 193, 196 & n.4 (1980); *see United States v. Dieter*, 429 U.S. 6, 8 & n.3 (1976) (per curiam); *United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979); *United States v. Woodruff*, 596 F.2d 798, 799 (8th Cir. 1979) (per curiam).

the running of the period for filing notice of a criminal appeal, that motion would have to be timely. *See Stolarz, supra* at 109-10; *cf. Browder v. Director, Department of Corrections*, 434 U.S. 27, 264 (1978) (same; civil rules). The Superior Court Criminal Rules have no provision for filing a motion for reconsideration and, therefore, set no time limitation.[3] In any event, to be timely for tolling the appeal period, such a motion would have to be filed within the ten-day appeal period. *See Jones, supra* at 196 n.4. A motion filed after the time for filing an appeal has lapsed cannot toll that period retroactively. Here, appellant's motion for reconsideration was filed 13 days after the contempt order. We therefore have no jurisdiction to consider the appeal. *Brown v. United States*, D.C.App., 379 A.2d 708, 709 (1977) (per curiam).[4] The Motion for Reconsideration is denied.

So ordered.

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[3] Even if the trial court, absent a rule, has inherent authority to reconsider its own action and can determine the limits of a reasonable time for filing such a motion, this ability of the trial court to grant relief from its own order or judgment has no relationship to the question of appellate jurisdiction over the order or judgment itself. For example, by way of analogy, under Super. Ct. Cr. R. 33, a motion for a new trial based on newly discovered evidence can be made within two years of judgment. This, however, does not extend the time limits for direct appeal. Although a denial of a motion for a new trial based on newly discovered evidence is an appealable order, such an appeal is not a substitute for direct appeal and can not raise issues which should have been resolved on direct appeal. *See Atkinson v. United States*, D.C.App., 366 A.2d 450, 452 (1976); *United States v. McCord*, 166 U.S.App.D.C. 1, 8-9, 509 F.2d 334, 341-42 (1974), *cert. denied*, 421 U.S. 930 (1975).

[4] The rules of this court allow the trial court to extend the appeal period upon a finding of excusable neglect. *See*

Brown, *supra* at 709-10; D.C.App. R. 4 II(b)(3). Appellant's motion to reconsider did not request an extension of the appeal period and stated no facts pertinent to the delay in filing the notice of appeal. In denying the motion to reconsider, the trial court made no reference to any extension of the appeal period. We decline in effect to amend the rules of this court regarding the tolling of the appeal period, D.C. App. R. 4 II(b)(2), by holding that a motion to reconsider extends the appeal period under D.C.App. R. 4 II(b)(3) without any showing of excusable neglect in filing the notice of appeal, an express request for extension of the appeal period, or the granting of an extension by the trial court. *Compare Stolarz*, *supra* at 111-12 (remanded *sua sponte* for determination of possible excusable neglect in delay).

In a related vein, in limited circumstances, when a party fails to file a timely notice of appeal in reliance on a statement or action of the trial court indicating that the party has timely filed a postjudgment motion that tolls the appeal period, that motion, although in fact untimely, does stop the running of that period. *See Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (per curiam), *reversing* 116 U.S.App.D.C. 127, 321 F.2d 393 (1963) (per curiam); *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384, 386 (1964) (per curiam). *See generally* 9 MOORE'S FEDERAL PRACTICE § 204.12[2] (2d ed. 1980). This "lulling" doctrine does not preserve this appeal.

Although the "lulling" doctrine emerged from the civil context, for present purposes we shall assume, for the sake of argument, that it can apply to criminal cases. In *Jackson v. United States*, D.C.Mun.App., 119 A.2d 721 (1956), the court held that the trial court could not treat a postjudgment motion filed after the expiration of the appeal period as a notice of appeal. *See id.* at 722. The court reasoned that neither the trial court nor the appellate court had the power to enlarge the appeal period. *See id.*; *Jones*, *supra* at 196 n.4. Because *Jackson*, however, involved an apparently deliberate attempt to extend the appeal period, the case does not necessarily foreclose the possibility that the trial court's inadvertent error for equitable reasons could lead to an enlargement of time for filing a criminal appeal. *See, e.g.*,

Separate Statement of *Associate Judge* MACK: Appellant filed a notice of appeal on June 20, 1979—the seventh day following the trial court's denial, by a six and one half page, "Memorandum Order" (dated June 13) of appellant's "Motion to Reconsider and Vacate Contempt Citation". The court's order considered not only legal and factual arguments but affidavits filed by appellant.

I could follow the majority in holding that we have no jurisdiction to entertain this appeal, if it were likewise holding that the trial court had no jurisdiction to reconsider her original May 16th order. The reluctance to go the latter route poses a problem for me.

The fact is that the trial judge did reconsider her prior ruling in denying the motion to reconsider and vacate. Having done so without challenge, the issue becomes, not so much one of "lulling" or "tolling," as one of determining what was the final order for purposes of appeal. The record before us throws no light on the matter. Faced with ambiguity, I would not penalize appellant by precluding jurisdiction in this court. *See United States v. Nicks*, D.C.App., 427 A.2d 444 (1981). I would be reluctant to do so particularly in this most difficult area where a late appearance by a lawyer has been assessed as criminal conduct.

United States v. Wickland, 619 F.2d 75, 79-80 (Temp. Emer. Ct. App. 1980); *United States v. Cooper*, 482 F.2d 1393, 1399-1400 (Temp. Emer. Ct. App. 1973).

Application of the "lulling" doctrine, however, would not cure the defect in this case. Appellant does not contend (nor does the record reveal) that the trial court made any representation or acted or failed to act in any way that caused him to miss his opportunity to appeal. In these circumstances, we have no basis for concluding that the judicial system is estopped to deny the appeal on the basis of untimeliness. *See* 9 MOORE'S *supra* § 204.12[2], at 4-73 to -76.

APPENDIX E

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 79-699 Filed July 20, 1981

IN THE MATTER OF:

HARRY TOUSSAINT ALEXANDER, T 14902-78

Appellant.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Harris, Mack, Ferren and Pryor, Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing en banc, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

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Clerk, Superior Court

Honorable Harry T. Alexander
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Deputy Corporation Counsel